UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Case No. 01-1139 (JKF)
	.	
W.R. GRACE & CO.,	.	
et al.,	.	USX Tower - 54th Floor
	.	600 Grant Street
	.	Pittsburgh, PA 15219
Debtors.	.	
	.	October 7, 2009
. . . . .		3:04 p.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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THE COURT: Good afternoon. This is the matter of W.R. Grace, 01-1139. There are several matters scheduled for argument this afternoon. Everyone is appearing by phone, and the list I have is, Scott Baena, Janet Baer, David Bernick, David Blabey, Stan Blatnick, Thomas Brandi, Elizabeth Cabraser, Gabriella Cellarosi, Ann Cordo, Andrew Craig, Leslie Davis, Elizabeth DeCristofaro, Elizabeth Devine, Martin Dies, Terence Edwards -- would whoever is using some handheld device please either put your phone on mute or stop using is so that it doesn't interfere with the recording system here, please -- Terrence Edwards, Lisa Esayian, Sander Esserman, Marion Fairey, Nathan Finch, Richard Fink, Roger Frankel, Theodore Freedman, Jonathan Guy, Barbara Harding, Daniel Hogan, Robert Horkovich, Mark Hurford, Christina Kang, Brian Kasprzak, John Kozyak, Matthew Kramer, Arlene Krieger, Michael Lastowski, Elli Leibenstein, Richard Levy, Mindy Lock, Edward Longosz, John Mattey, Francis Monaco, James O'Neill, Kate Orr, David Parsons, Carl Pernicone, Marc Phillips, Margaret Phillips, John Phillips, Mark Plevin, Joseph Radecki, Natalie Ramsey, Alan Rich, Andrew Rosenberg, David Rosendorf, Alan Runyan, Jay Sakalo, Tancred Schiavoni, Darrell Scott, Mark Shelnitz, Michael Shiner, Walter Slocum, Jason Solganick, Daniel Speights, Shayne Spencer, Theodore Tacconelli, David Turetsky, Edward Westbrook, Jennifer Whitener, Jeffrey Wisler, Richard Wyron, Rebecca Zubaty and Peter Lockwood. Ms. Baer? Mr.

Bernick?

MS. BAER: Good afternoon, Your Honor.

THE COURT: Oh, Ms. Baer. Okay.

MS. BAER: Sorry, I had it on mute. Your Honor, there are three matters, I believe, on the agenda today. Debtors' motion in limine with respect to Anderson Memorial's witnesses, William Ewing and Gibson Solomon, as well as Anderson's motion to compel. And I believe Mr. Bernick is on to address all of those issues.

THE COURT: All right, Mr. Bernick.

MR. SPEIGHTS: Your Honor, while we're waiting on Mr. Bernick. This is Dan Speights representing Anderson Memorial Hospital. I'm not sure which order Mr. Bernick intends to proceed in, but we believe strongly that we should proceed chronologically in the order they were filed. We filed our motion to compel back in August and without just being petulant about the matter, we think substantively, as well, our arguments would flow from having that matter heard. That involves Mr. Shelnitz and Ms. Zilly and Mr. La Force. Mr. Bernick asked that Mr. Ewing be added to the agenda after you agreed to hear that matter that we filed, and in addition, after the hearing Mr. Bernick filed the Solomons matter. But any event, we would request that we proceed with the third matter first.

THE COURT: All right, that's fine. Go ahead.

MR. SPEIGHTS: Thank you, Your Honor.

MS. BAER: Your Honor, before Mr. Speights proceeds, I was just wanting to make sure Mr. Bernick is on the line, because I did not hear him yet.

MR. BERNICK: Yes, I'm sorry, Your Honor. This is David Bernick. I am on the phone. I apologize, I'm in the back of a limo and it should be very quiet, but I have a Ninth Circuit argument tomorrow and I'm on my way to the airport. So, I'm going to try to keep it as quiet as I can and also put my phone on mute. Understand I just got on, Mr. Speights wants to take up Mr. Shelnitz's motion first, which is fine with us.

THE COURT: All right. Oh, not again.

(Technical Difficulties)

THE COURT: Okay. At the moment we're free of that noise. So, Mr. Speights, if you don't mind starting. If it happens again, I apologize, I'll have to interrupt and try to get it fixed, because we can't hear over that noise, but we'll try it.

MR. SPEIGHTS: That's fine, Your Honor. And I couldn't hear over the noise either, so I'll know immediately if it starts again.

Your Honor, the motion to compel Anderson is filed, and as Your Honor is aware from the briefing, deals with three witnesses, Mr. Shelnitz, Ms. Zilly and Mr. La Force. Of course much of the focus is on Mr. Shelnitz, because most of the

instructions not to answer dealt with Mr. Shelnitz's deposition. With only six days before the confirmation hearing resumes, Your Honor, I'm not going back into all of the history of this. It's covered in the brief and prior hearings.

It seems to me that the issue before Your Honor is pretty straightforward. The burden is on Grace to show why Mr. Shelnitz should not be permitted to answer these questions. We served a discovery deposition, a notice of deposition back in May and that's where we are today. We are trying to get discovery from Mr. Shelnitz and also from the other two witnesses.

Mr. Shelnitz is not even going to be called by the plan proponents during Anderson's phase of these proceedings. It seems to me that we ought to look at the three areas where Grace objects or instructs Mr. Shelnitz not to answer the questions and see if we can resolve those three areas.

First of all, we asked Mr. Shelnitz and we asked Ms. Zilly and Mr. LaForce a series of questions about one item dealing with feasibility. The debtors have produced a confidential report. During the examination of Judge Sanders the other day in the courtroom, they permitted me to refer to a 37.3 number out of that report and read into the record what that number is supposed to be. That number deals with property damage. We don't know anything else. We asked Ms. Zilly and Mr. La Force about that number. They are relying on that

number in their feasibility work, but neither one of them would reveal what that number is because they were supposedly told about that and I assume that that's correct that they were told about it by Mr. Shelnitz and the debtors instructed Mr. Shelnitz, when we later asked him, as well as Ms. Zilly and Mr. La Force not to discuss that number, that somehow it was protected or privileged.

Leaving aside all the other arguments I'm going to make on the other issues pertaining to Mr. Shelnitz, once Grace had its own expert, Ms. Zilly, relying on that information and put that report into evidence, there is no basis, that I'm aware of, for keeping us from legitimate inquiry into the basis of that 37.3 property damage number. So, Your Honor, we would request you to direct all three witnesses to discuss that 37.3 number.

The second matter, Your Honor, deals with what we refer to as our good faith issue that we have presented in our objection from the time our objections were first due. We have taken the position, as Your Honor knows, that this plan was not proposed in good faith. Mr. Shelnitz -- and he's the only one involved on this issue that's before the Court -- Mr. Shelnitz, has testified that he was actively involved, indeed he was the lead company man involved in the negotiation of the plan and the negotiation of the plan with a PI constituency, with a ZAI constituency and with equity and the bank. He has been

identified as really the hub of the negotiation of this plan with all groups except property damage which we say -- traditional property damage -- which we say was excluded from the process.

Under those circumstances, we believe that we are entitled to go into those negotiations, which led to this plan of reorganization to show that the plan, in fact, was not proposed or has not been proposed in bad faith, that discriminates against property damage claimants, that was directed, directly intended to exclude property damage, traditional property damage from those negotiations.

Leaving that aside, however, Your Honor, and I believe that would be a perfectly legitimate reason to question Mr. Shelnitz. In fact, the debtors had made the lynchpin of their good faith argument, of course they have the burden of proof to show the plan's proposed in good faith, they have made a lynchpin of it, the fact that, according to the debtors and according to the other plan proponents, that this plan was negotiated in good faith, that it was negotiated at arm's length. In their major brief before Your Honor, they refer to good faith negotiations of the plan some 50 times.

In addition, Your Honor, the debtors have referred to negotiations when it's in their interest to do so. For example, Mr. Shelnitz also negotiated with the bank. And there's Mr. Shelnitz's deposition, the same deposition where

the debtor's instructed Mr. Shelnitz not to answer a large number of questions that I propounded, he testified in detail concerning his negotiations with the bank in response to questions by the Creditors' Committee. We think there's also a waiver issue.

THE COURT: But, Mr. Speights --

MR. SPEIGHTS: I hear it, Your Honor.

THE COURT: It's apparently coming from this microphone when I turn this speaker up so I can hear him. Otherwise, I can't hear him. And then when I try to talk, that's what noise is happening.

I apologize, Mr. Speights. If you can give me a second here, I've got some people who are looking at this.

MR. SPEIGHTS: That's fine, Your Honor. I'm not in any kind of hurry.

THE COURT: All right. I'm hoping not to fry anybody's ears. There's still all kinds of feedback coming from here.

Mr. Speights, the question I was going to ask is, with respect to discrimination against property damage, doesn't this plan provide for 100 percent payment of all the allowed property damage claims, both present and future?

MR. SPEIGHTS: Your Honor, I'm going to answer that partially and I also have Mr. Rosendorf on the phone, as well, if he would like to elaborate. But, it certainly provides for

100 percent plan. I do not think it provides for interest which we are entitled to. In addition to that, unlike the future property damage claims, we are prohibited from having a jury trial. And, in fact, as we showed, during the last hearing, originally, traditional property damage claims and future property damage claims, but both have a right to a jury trial in the District Court of Delaware, and then when the debtors changed that -- and I might add they changed that after discussions between Mr. Shelnitz and Judge Sanders, that's the testimony on the record -- that Mr. Shelnitz discussed the matters with Judge Sanders. They changed that and Judge Sanders got for future claimants the right to a jury trial not only in Delaware, but any other District Court. But they didn't just stop there, they, without discussions with us, changed the plan so that we no longer had a right to a jury trial in Delaware, we were sent back to the Bankruptcy Court to try our case.

And we want to explore that now. I know ultimately Your Honor's going to hear arguments that there's no discrimination, legal discrimination, because we get 100 cents on the dollar. And we want to make our argument, yes there is discrimination because of this and other reasons, and right now we're just trying to get the discovery deposition on that point, Mr. Shelnitz is the one who knows why they changed that.

THE COURT: Okay, go ahead, Mr. Speights.

MR. SPEIGHTS: In any event, Your Honor, the first argument was, there's a feasibility issue that we want to examine all three witnesses about, and Mr. Shelnitz is probably the most knowledgeable person about the 37.3. Second reason, Your Honor, is that we believe that we're entitled to question him about good faith and while there may be many occasions when you can't go into so-called settlement negotiation, we believe that we are entitled to go into the negotiations of this plan of reorganization regardless of whether that information is admissible or not, we think it will be, to show that the debtors have designed a plan here to discriminate or not treat appropriately traditional property damage claims. And in more particular we believe that the debtors, going back not only to the negotiations that took place in the past year, but going back to starting in 2005 that Mr. Shelnitz had designed the plan to specifically attempt to -- and I use this word because it is the word that was used against us -- to smear Anderson Memorial Hospital. And we believe that we're entitled to question Mr. Shelnitz about that. Mr. Solomons' deposition has now been taken, we'll discuss Mr. Solomons in a few minutes, but we have support that the debtor's aware of, it's had his affidavit for a couple of months, and we now have a deposition testimony in which the debtor, about the time that Mr. Shelnitz took over as general counsel, decided to smear Anderson Memorial Hospital and its counsel in an effort to treat them

differently than other asbestos claimants in this bankruptcy.

And for those reasons, Your Honor, we think we're entitled to take the deposition. Again, it's a discovery deposition. Your Honor can deal with the admissibility of evidence if we try to publish it. We think that we might also get other information which we might be able to use at the confirmation hearing, but we don't think it's appropriate that the debtors have shown any basis, at this point, to stop Anderson from asking the questions altogether. Thank you, Your Honor.

THE COURT: Mr. Speights, with respect to, you said something, let me see in my note, because I hadn't fully formed the thought, so I'm not sure I can ask the question. Just one second. The debtor's not treating property damage claimants equally in singling out Anderson. Actually, I'm not, there is a difference in treatment between the current property damage claims and the futures to the extent that some can be tried in a different court other than the Bankruptcy Court, the futures can and the currents can't. But, I'm not sure that Anderson's going to end up being the only claimants in that position.

To the extent that the California claims are now somehow or other going to be tried in bankruptcy because the summary judgment was reversed, it appears that those claims will be there, too. So, I also don't understand the discrimination argument on that score. If you could elucidate

that for me, I would appreciate it.

MR. SPEIGHTS: Your Honor, and I might add that Mr. Rosendorf is on the line that he might take a stab at that for you, my bankruptcy lawyer.

THE COURT: All right.

MR. ROSENDORF: Your Honor, thank you, and thank you, Mr. Speights. I would be glad to address that, Your Honor. When this plan and disclosure statement were drafted, and when they were circulated and when they were proposed, there was only one claim that was singled out under the proposed property damage case management order, which is an attachment to the plan, which was going to be treated in a way that was unique to any other property damage claim, and that was the Anderson claim. And that treatment was singled out for Anderson and for no other claim and there are references in the PDCMO that deals specifically with the Anderson claims and no other.

So, we believe that the plan, as it was filed, did certainly single out Anderson for particular treatment. And I think to some degree, Your Honor, we are overlapping two potentially related but still distinct issues. One of them is a classification issue, and the other is a good faith issue, and they have some bearing upon each other, but I do think that they are separate. And it is our intention to show that Anderson has been singled out for particular treatment that has been disparate from that of other claimants and other creditors

in this case and that that has been done in a manner that is reflective of a lack of good faith and which was integrated and incorporated into the plan.

So, the purpose for seeking the testimony from Mr. Shelnitz on this issue is not simply to speak to a classification objection under one section of 1129, but also to speak to the good faith issue, which addresses, I think, a broader panoply of issues, particularly in light of the debtors and plan proponents having staked their argument on good faith, on their good faith, arm's length negotiations as they repeatedly described and referred to in the plan proponents' brief. So, we do think that it is a broader issue than just a classification issue.

THE COURT: All right. Well, I did take a look at the deposition of Mr. Solomon that was done, and my understanding from reading that deposition, so please correct me if I'm wrong, is that that discussion to the extent it occurred, I'm not making findings that it did, but let me just assume for purposes of this discussion that what Mr. Solomon says was said, was said. Just making that assumption. It doesn't appear that that discussion came up in the context of plan negotiations. It came up in the context of trying to figure out what to do with the objections to claims of Anderson Memorial and -- I'm sorry, not of Anderson Memorial -- of any of the claimants represented by the Speights' law firm that as

to which there was no purported authority to represent the claimants. So, how does that discussion assist in the good faith negotiation issue if it wasn't undertaken in the context of plan negotiation?

MR. SPEIGHTS: Well, Your Honor, I'm not sure, because we're not in the same room, whether Mr. Rosendorf wants to address it, as well, but I do think by that time that the debtors had filed their plan in late 2004 or early 2005, and in order to push this plan through, they began discussions with various groups and the record will show that they started discussions with the PI group then that led ultimately to the deal, and that overall they were promoting a plan and trying to get rid of the Speights and Runyan claim, we think, in a disparate way as a part of trying to get a plan pushed through the Bankruptcy Court. So, I don't think it's completely separate from a plan negotiation.

THE COURT: All right. The second issue, the one that I was attempting to ask before, as I understand your contention, somehow or other because at the time that the property damage case management order was entered, there was only one claim of record that hadn't been resolved that that is singling out that one claimant, even though the plan treatment will apply to any current claimant, not just to Anderson Memorial, and if there are additional current claims, they're going to have the same result that Anderson faces.

MR. SPEIGHTS: Again, Your Honor, Mr. Rosendorf may address that, but you are correct in the sense that the plan does provide if some other claimant, such as the State of California, comes back before Your Honor it would propose to treat the State of California in the same way. However, I'm not sure what the State of California's position is going to be on that. At the time when objections were due to the plan, the State of California was in another jurisdiction, it was up in the District Court. I'm not sure what the State of California's position is going to be, or any other who may come back.

THE COURT: Well, I don't know what their position is going to be, but the issue is whether or not the plan discriminates. And to the extent that the plan calls for treatment of all current property damage claim trials to be treated in the same fashion, I'm losing where there is discrimination.

MR. SPEIGHTS: And I would say to Your Honor, and again Mr. Rosendorf may comment as well, but it depends on where you draw the line from. I look at it as the treatment of asbestos claims. 524(g), in addition to the other sections, but 524(g) deals with all asbestos claims. And so I start with the proposition that there is a difference of treatment between personal injury claims and property damage -- traditional property damage claims. There are, as I have spoken to Your

Honor previously about, the personal injury claimants have the benefit of a trust where defenses will not be allowed and claims will be resolved by an administrator, albeit for less than 100 cents on the dollar, I understand that, but there are advantages and disadvantages. Asbestos ZAI claims will be decided in accordance with the trust, with procedures drawn by the claimants themselves with advantages and the disadvantage of not having 100 cents on the dollar. And asbestos property damage future claims we'll get to go to the tort system and litigate those claims. And at the same time, one of the asbestos property damage, traditional property damage claims, there are only seven, according to the debtors, which were filed before the bankruptcy. Originally, the debtor said that those seven could return to the tort system. It's now flipped the world upside down and it is said that five of those seven -- or actually six of those seven must now go to the Bankruptcy Court and everybody else can go to the tort system, including one of the seven, which is the Solo case, which is on appeal in the State Court in New York, so it will go back to the State Court while Anderson would remain in the bankruptcy court.

Again, at this discovery stage, we just want to develop the facts on how all that came about and then make these arguments either next week or whenever we are briefing all the arguments.

THE COURT: All right. Anything else, Mr. Speights

or Mr. Rosendorf? Mr. Bernick?

MR. BERNICK: I'm hopeful my voice will override the background here. There are a bunch of different things that have been said, many of them relating to legal confirmation issues. I know that Your Honor, in fairness to Mr. Speights, raised these questions, and I will address them, albeit, I don't think that that's necessarily the heart of why we're talking here today.

I think that basically we're here today because of privilege issues. And when it comes to the assertion of those privilege issues, the initial burden of establishing the existence for the privilege clearly is on us. But, the burden of going forward and saying that that privilege needs to be overridden, either because it was waived or because the probative value of the materials sought is so overwhelming and whether or not available by other means than by inquiring into privilege matters, that burden is on Mr. Speights and his client. It is not on us.

And to cover the two specific matters that have been raised, although I'll add, Your Honor, that we did, in fact, in response to Mr. Speights' brief, as I think Your Honor is aware, put together kind of a spreadsheet which took each of very specific questions. Mr. Speights actually broke down his concerns into specific questions. We, on a spreadsheet listed those questions, listed the depositions where -- part of a

deposition where those questions were posed, listed the basis for the objection and then set out a position. And in many, many cases, we set out a position that was fully responsive to the questions that were put, even when those questions were not even asked during the course of the deposition. So all the information is there.

Now, Mr. Speights may say, well, why can't I get that from Mr. Shelnitz? And that's basically part of the problem that exists by virtue of Mr. Speights having chosen to ask Mr. Shelnitz those questions as opposed to other people who might be able to answer those questions, experiencing what would be a risk of waiver. There already has been discovery regarding the negotiation of this plan, and discovery could have been conducted with respect to many individuals. Mr. Speights has chosen to single out Mr. Shelnitz who is the general counsel of the company. And, obviously, taking the deposition of the general counsel of the company poses all kinds of risks of waiver and compromising properly asserted privileges. It is for that reason that generally the practice, and what the Courts have said in the case law, is that you can't ask counsel questions unless you can establish to the Court that only counsel has got the information that's responsive. Essentially you don't have any other recourse. And that's not been established with respect to any aspect the Court's being inquired of with respect to Mr. Shelnitz.

But, the bottom line is that we were retained to go through each and every one of the questions and provide a position and provide a response to information. The specific issues that Mr. Speights now raises today, as I can see it, although it kind of meanders a little bit, are basically twofold. One, is that he wants to inquire into the genesis of a $37 million number. And he says that there's a need to do so because it's part of the feasibility issue of the case. It is only part of the feasibility of issue of the case insofar as that 37 million is a reserved number, and therefore appears on the pro forma balance sheet of the debtor and therefore is part of any feasability analysis or any best interest analysis. I mean, liquidation analysis would have to consider as one of the figures in the analysis; a reserve. That's the only real reason that it's there. Thirty-seven million dollars doesn't make or break feasibility, doesn't make or break best interest. And the reason that Mr. Speights is so single-mindedly focused on the 37 million is that he knows that if they reserve what's been set for the already filed traditional PD claim, i.e., it covers the PD claims outstanding that have not been resolved, and specifically would cover the claims of Anderson Memorial, if in fact any money has been set aside for Anderson Memorial. It would also cover other claims that are still pending, have not been settled.

A reserve number established in litigation is clear

work product. It is not subject to inquiry. It would not only incur on the work product privilege, it would also violate the rule against discovery of settlement information, because it may well be that those numbers reflect projected settlement of cases. Reserve numbers have never, for liability, have never been the subject of specific inquiry to unpack them in this case, inquiry that's been -- and there should be no exception here. That this is evidence it is also evident from Mr. Speights' question, because he asked specifically whether estimates had been done of the liability for the unresolved traditional PD claims, and he asked specifically whether an estimate was done for the Anderson claimant, particularly. And all those questions were objected to and there were instructions, because they are improper questions. The fact that $37 million is down there as a litigation reserve that is considered as one of a thousand points of data on feasibility doesn't make it discoverable. It's classic attorney/client privilege, work product and Rule 408 and it should not be discoverable.

You don't have an opponent given access to information about what the company may well consider to be a reasonable value and settlement (indiscernible).

The second issue or area where Mr. Speights seeks to conduct inquiry relates to the negotiation process. And as I understand it, the genesis, or the more particular genesis of

the request focuses on the feelings that he has that Anderson Memorial was somehow singled out or targeted for less favorable treatment. And that that gives rise to a claim of lack of good faith in the negotiations of the plan and it gives rise to an allegation that there's discrimination against Anderson Memorial. And I think that those were the two rationales that were advanced to support that particular request.

Again, we have to go back to the rule. Settlement negotiations are classic Rule 408. Rule 408 material is not only not admissible, it's not discoverable. That's the Goodyear decision out of the Sixth Circuit. I don't know whether it's been adopted in the Third Circuit, but I think that it has. Memory serves that it has. But, that clearly is the right answer under the law. It's also the answer that Your Honor afforded when the issue of taking Mr. Shelnitz's deposition came up and was discussed before the Court whenever it was in July or some earlier point in time, Your Honor made clear that the deposition, while it could be taken, could not stray into the area of negotiation and litigation strategy. Which is exactly both of these points are negotiations -- settlement negotiations and litigation strategy.

Rule 408 is about work product and attorney/client information, because it comes through Mr. Shelnitz. So the question then becomes, has Mr. Speights sustained his burden of establishing that notwithstanding those privileges, there is a

sufficient need and an absence of availability of the same information through other sources to nonetheless warrant the discovery going forward? The issue doesn't go away because we're not yet talking about admissibility. The issue is posed when the question is asked and answered, so the fact that it's a discovery deposition doesn't make any difference. Maybe it makes a difference under certain state courts, I doubt it, but it certainly doesn't make a difference in federal court.

So, the question then becomes, what's the rationale, or what's the justification that's been afforded for breaching the privilege that would apply to the negotiation process? The first is to simply say, well, gee, good faith is an issue and discrimination is an issue, and therefore, well, I've got to be able to inquire into it. That's not the question. Of course there are issues, there are issues in every case. The question is, on what basis does the existence of those issues, which is really dictated by code, mean that the privilege that's otherwise applied under federal rules and are incorporated in the Bankruptcy Code are that there's an exception to those. So, to simply state that there are issues, doesn't accomplish anything, at all. You have to establish you can't get the -- the information's actually relevant and you can't get it from any other source, and he hasn't established that in any way, shape or form.

The specifics that he provides are twofold. First,

that there was a meeting that took place in 2005 where Mr. Solomon attests that I made certain statements regarding Mr. Speights. The fact of the matter is, as Your Honor has recognized, and without regard to, and I'm not going to testify about what actually took place in that meeting insofar as any such statements were concerned, that's an inaccurate recitation of what happened at the meeting. But, Your Honor's absolutely correct. That meeting took place at the very early stage in the process. We had just filed our first plan. We were in the process of lodging objections. In fact, the objections to PD claims were filed that very afternoon and that's why I certainly don't remember spending hours and hours in that room because we were busy working on other things. And the issue was Mr. Speights' continued prosecution of these claims where he didn't have authority. That was the issue. It was not a negotiation session concerning the plan at issue. Indeed, it's probably best to say it wasn't a negotiation session concerning any plan. There was no plan on the table, other than the plan that didn't make any differentiation between current and futures, it treated everybody the same way, because it's a plan that basically called to litigate pretty much anything that couldn't be settled, whether it was during the bankruptcy process or subsequently. It was certainly not the negotiation of the plan that is at issue.

So, whatever happened that day, even in Mr. Solomons

view, has no bearing on a discrimination charge and no bearing on a good faith charge because those relate specifically, those are (indiscernible) insofar as the plan at issue is concerned.

The second point, and it is that at some point a decision was made to single out Anderson Memorial, subsequently, not to give them the same treatment under the plan before the Court. And all that I can say is that I think the discrimination charge and the good faith charge are frivolous and for reasons that are well apparent to the Court. The good faith is established even with respect to Mr. Speights in this case. Mr. Restivo, who had charge and undertook the very considerable burden of negotiating all of the individual settlements that was done on an individual basis, negotiated and settled with everybody he could settle with. And while -- and there are very, very few claims that are left, and Mr. Speights -- even Mr. Speights has got basically a claim for Anderson Memorial that is left. How he can say that somehow there was a singling out of him is contrary to fact. To single out Anderson Memorial, he singled out Anderson Memorial because he's insisted upon Anderson Memorial pursuing its thus far unsuccessful class claim. It's probably the reason why we haven't settled Anderson Memorial. But, the negotiation process shows no aspect of bad faith. It shows to the contrary, assiduous good faith.

On the discrimination point, there is no

discrimination. Any claim that's not settled is litigated. And the only question is what courts it litigated, and they're all litigated in federal court. And the only reason why there's any differentiation between currents and futures is that we clearly required the currents because their claims were already active and because the litigation was already mature before Your Honor that we weren't going to have them go off and be handled by some other court. And that was a clear and reasonable and nondiscriminatory differentiation.

Whereas the future demands, all that we really were concerned about was that they would be in federal court. We would have preferred that they also be before Your Honor, but the futures' representative negotiated successfully to obtain the result that they can be prosecuted in other federal courts. The treatment is exactly the same. And financially, treatment is exactly the same in terms of their being litigated. The only difference is, one, that it's driven by the maturity of litigation and there's nothing in the discrimination or equal treatment provision of the code that basically requires that in mature cases that they start all over again before a different judge. I don't think that that's a proper and reasonable construction of the code.

In any event, all of these issues, good faith, discrimination, involve minimal facts that are other than what is set forth in the plan. We've already had this discussion

with Your Honor. It is not necessary in order to ascertain good faith or discrimination to go into the negotiation process. In the ordinary course, there is no such requirement. The process simply has to be discussed in general terms, as often happens in the bankruptcy process, and the whole focus is then on the plan. What does the plan actually do? Does the plan show good faith or bad faith? Does it show discrimination? And that again I think is the only way to harmonize the Bankruptcy Code's position to incorporate Rule 408 which precludes requiring the settlement negotiations with the plan requirements of good faith and equal treatment. And Mr. Speights has not introduced any evidence that would suggest that somehow they must be in conflict in connection with this case.

So, we think that we've given -- we tried to provide Mr. Speights everything that possibly can be provided by way of information and understanding in response to his specific questions. We've also provided the deposition of Mr. Shelnitz. He's also had access to other people whom he could have deposed upon any one of these issues, including Mr. Finke. And he had just decided that, you know, for whatever reason, he wants to make this an issue about the general counsel of Grace and we don't believe that that's appropriate under the rules.

THE COURT: Mr. Speights, anything else? Hello?

UNIDENTIFIED SPEAKER: Your Honor, he just joined

back.

MR. SPEIGHTS: Excuse me, Your Honor. I got disconnected.

THE COURT: Oh. When did that happen?

MR. SPEIGHTS: I think I heard all of Mr. Bernick. I think he was winding up.

THE COURT: All right. Where did you leave off?

MR. SPEIGHTS: I think he was saying we've been through all of this before. I mean, it's only been, you know, 60 or 70 seconds since I've been disconnected.

THE COURT: All right. Go ahead then on any further comments you have, Mr. Speights.

MR. SPEIGHTS: Thank you, Your Honor. I assume Mr. Bernick did not concede during the one minute I was off the line.

THE COURT: No, I don't think so.

MR. SPEIGHTS: Quickly, Your Honor. First on the chart, I think it's self evident that we do not accept service on Mr. Bernick's summary of what our positions are, what our position is. And I want to point out again that we asked a number of questions and we wanted to ask more questions and the debtors took the position that they would seek sanctions if we pursued any of these lines. So, that's not the beginning and end of all the questions we wanted to ask, although I believe that we could finish the deposition of Mr. Shelnitz certainly

in less than two hours.

Number two, Mr. Bernick said, why Mr. Shelnitz, the corporate counsel, the general counsel for W.R. Grace? Mr. Shelnitz was the one identified by Judge Sanders as the one he spoke to. He was the one identified by Mr. La Force. He was the one identified by Ms. Zilly. And finally, he was the one identified by Mr. Finke, at least inferentially, when Mr. Finke testified the change in direction that occurred in 2005 and when Grace abandoned the discussions between Mr. Finke and Mr. Beber and Speights and Runyan. That was a decision of the general counsel. So, Mr. Shelnitz is at the center of this matter. We're not picking on him simply because he is the general counsel.

Number three, back at the 37.7 or 37.3. I appreciate Mr. Bernick's explanation today about what that number is, but that's an explanation we have never received. In fact, the witnesses, Mr. Shelnitz, Ms. Zilly, Mr. La Force, all refused to describe what that number is. And with due respect to any member of the bar describing an understanding, we think that testimony as to what that number is should come from the witness. If, upon pursuing that number, the witness is prepared to say what Mr. Bernick said today, that somehow it's a reserve, et cetera, they may reassert some objection to it. But, they haven't laid the foundation yet for that. Which leads me to a more basic reason for Mr. Shelnitz's deposition,

and that is, what estimation, what forecast have they made for a traditional PD liability in this case? And that's clearly a feasibility issue. Perhaps 37.3 is part of that, perhaps it's not. What Grace says in this chart, Item Number 6 is, any such estimate is privileged. So, I don't know what the privilege is that prevents the debtors regarding feasibility to say what estimate they have made for traditional PD claims.

Number five. Good faith. Part of the good faith, and it goes back starting in 2005 until recently, but part of the good faith is the very last thing they did. The good faith is that they discussed their proposed treatment of PD claims under the plan which provided identical treatment, identical tort remedies for future PD claimants and further PD claimants. And then they had negotiations, they had discussions with Judge Sanders and his counsel. Mr. Bernick has again acknowledged it today. But, at the same time, they refused to have discussions with Anderson, perhaps with the PD Committee, I don't know, I'm not here representing the PD Committee. They refused to have discussions with Anderson and, in fact, then changed the plan to reverse what they had previously provided and took away what they originally had provided for Anderson while leaving it in place for Solo and for future PD claims.

Your Honor, Mr. Bernick has referred to the Goodyear case out of the Sixth Circuit. I don't think the Goodyear case has been adopted by the Third Circuit. If it has, I have not

seen that opinion, and there are numerous other cases. Although I'm aware that in another bankruptcy in which I was involved, Your Honor has followed the Goodyear decision in the particular facts of that case. I don't think there's anything in Goodyear, and there's certainly nothing in the Third Circuit that I'm aware of that says a debtor can go forward with the plan and argue that it's proposed in good faith and it was negotiated in good faith, and then prohibit an objector to having discovery about that process.

Lastly, Your Honor -- or next to last, Mr. Bernick says the litigation with respect to Anderson should proceed in this court because it's mature. Your Honor, there has been nothing done with respect to Anderson Memorial Hospital's case in this court. They didn't file summary judgment motions against Anderson. They did against most of my other claimants. There's been no hearing on the merits of Anderson Memorial Hospital's claim.

On the other hand, the Anderson Memorial Hospital claim has been litigated in South Carolina, was litigated in South Carolina for eight years and was ready for trial and could go to trial if it was returned to the court of general jurisdiction in South Carolina, it would be ready for trial. There has been nothing done in this court. So, the idea that somehow it's mature and ought to stay here is not supported by the facts.

Many of the assertions of Mr. Bernick are simply factual issues, and I urge again, Your Honor, just let us have the discovery and then we will see where we are when we argue on the merits before the Court. Thank you, Your Honor.

THE COURT: All right. I am going to do an order to address this issue, because I want to get through the rest of the arguments, and I want to consider what your arguments have been. I saw some of the questions that were asked appear to me to be proper questions that could be answered. For example, what the nature of the $37 million claim is. And by that, I mean in broad terms. Is it a reserve, is it something else? I think is a proper question. And a witness, not Mr. Bernick, should be available to answer that question.

What it comprises, however, is not the proper subject for discovery because Mr. Bernick is quite correct. If in fact it's a reserve -- I'll just assume for purposes of this that the witness would say it's a reserve -- if it's a reserve, it does constitute both work product and attorney/client privilege and potentially settlement discussion negotiations, none of which would, I think, be overridden on the basis of this record. To say that it's a reserve for property damage claims is, I think, something that a witness, in fact, can be compelled to state. But, beyond that, the basis for it, if it's a reserve, I think Mr. Bernick's correct, would not lead to admissible evidence and therefore is outside the parameters.

So, my concern is, I think some of the questions may be proper, others I think are not. And I'm not sure based on the record that I have here how I'm going to be able to get through that type of analysis. Just because --

MR. BERNICK: Well, Your Honor --

MR. SPEIGHTS: Your Honor, if I could --

MR. BERNICK: I'm sorry.

THE COURT: -- if I could finish please. You had your turns. Just because Mr. Shelnitz is general counsel does not prohibit him from, I think, having his deposition taken to the extent that he participated as a representative of the debtor, not as its general counsel, in the negotiation process. However, he is the general counsel and it is improper to ask him for advice that he would have given to the debtor or for work product in that respect.

So, there is a very fine line, which is why the cases say that if the information can be obtained elsewhere, it should be. I am not aware of which witnesses might be able to provide this other information. To the extent that other witnesses could answer the questions that I think are permissible, then I believe it would be more appropriate to have other witnesses answer those questions for that reason. And I would not permit an invasion of the attorney/client privilege or the negotiation privilege. I've already addressed the concept of the plan negotiations and I don't think I need

to go back into that again.

So, I'm a little confused with respect to this one motion to compel as to how to go about making a principled resolution. It seems to me that some questions are appropriate and others are not. Yes, Mr. Speights.

MR. SPEIGHTS: Excuse me, Your Honor. I didn't realize you were not finished. All I was going to do was point out to you that we did attach a copy of the full deposition to our reply brief.

THE COURT: Yes, sir. And I've read most of the deposition, but I'm not going to go through it question by question and determine whether every objection is proper. That's not how this motion has been raised. It's been raised to compel the answers to basically three specific inquiries as opposed to question by question. If you want to go through it and point out which questions you think should be answered, I'd be happy to take a look at that. But, I'm not going to make that, that's your burden, not mine.

MR. SPEIGHTS: If I could just respond to that, Your Honor. And I agree that we don't think it's a question by question, because we had more questions, but we did think there was subject matter that we were entitled to go into. So I think Your Honor's correct on that. Thank, Your Honor.

MR. BERNICK: Your Honor, I have to say, we, (a) had the deposition go forward, (b) all those questions were asked,

(c) he filed his motion to compel. He attached the transcript and he had the opportunity to do whatever excerpt that he wanted to point out, whatever questions he wanted to, and he did. And we then responded to that. And the way that we responded to it was completely in good faith. We gave him answers, we focused our objections, we narrowed the scope of what was at issue. And I'm happy to go through, at another time when it's better for the Court, the areas where you think -- Your Honor thinks that further inquiry is appropriate, and then determine exactly what that inquiry is and who should be asked this question.

For example, the question about what the $37 million reserve is for is not something that we have to take Mark Shelnitz's deposition to find out. There are any kind of number of people, and I would assume that an officer of the Court, that Mr. Speights would accept, particularly if the Court were to encourage it, an affirmation as a response to an interrogatory that said pretty much what I said. I'm not sure it hasn't already been described, but I'll accept that it hasn't and I'll accept that it should be described. There's no reason to have a deposition to do that. But, to go back and to have Mr. Speights now be given the opportunity to go back through the deposition and flag more questions and raise more issues and more subject matters than what were spelled out specifically in his motion when we are at the point where we're

at and the process that's been undertaken is where it is, I just think it's abusive.

And I think that it's fine, I mean, we'll do whatever it is that Your Honor obviously requires. But, the burden really is on Mr. Speights. And if Your Honor believes that there's further questions that should be answered, we're happy to do it. But, we think that the most --

THE COURT: Well, Mr. Bernick, I think you're correct. When I look at the motion itself, which is at Docket Number 23028. There are -- I'm not certain that these are actually the questions. It says instructions not to answer were made to the following questions, but they're not stated necessarily as questions, and I didn't go back --

MR. BERNICK: Right.

THE COURT: -- and check every one of these against the citations to see whether they are questions. But, I accept the proposition that these are the areas that were -- and maybe they're the specific question that was inquired about. I don't think so, because, for example, one of the questions under Mark Shelnitz is, what the elements of that $37.3 million number are. Then there's the citation to the August 20th deposition and it goes on for three pages. That's a pretty long question to be summarized in one phrase.

MR. BERNICK: Yes. Well, Your Honor, we sent through a chart, and the chart went through the specific areas that

were listed in Mr. Speights' motion, by number, including the misnumbering. And in that chart we repeated the question. We then provided the Court with the deposition pages, and in many instances, a few instances, I think the first two, there were no questions that were posed of Mr. Shelnitz. We then showed the basis for the objection, but then we indicate in the last column whether we're standing on it. But, more particularly, what the answer is, because it may be as the answer is not problematic, albeit having Mr. Shelnitz testify about it would be because it would create the risk of waiver. I guess I want to ask here, I know that we've sent it to court --

THE COURT: I have it.

MR. BERNICK: -- maybe if Your Honor --

THE COURT: No, I have it.

MR. BERNICK: Okay.

THE COURT: For example, the first one, to make sure I'm referring to the same thing you are, under "Topic" is Question 1, "Why is Anderson's claim not being 'returned to the tort system?'" And the answer says, "Not asked," or the deposition pages say, "Not asked." The basis for objection says, "Not applicable."

MR. BERNICK: Right. And that's what we went through in being responsive to this motion. These are the very questions that he decided in his own motion to ask for answers to. So, you know --

THE COURT: All right. I will go through Mr. Speights' motion and this chart with respect to the debtors' position. I have read the response and the reply, just so you're comfortable that I have done that. But, I haven't done it with this analysis. And then I'll give you a ruling.

MR. BERNICK: Okay, that's fine. I think that the other motions that Mr. Speights had were on Solomon and Ewing.

MR. SPEIGHTS: I didn't have them as a motion.

THE COURT: That's the debtors.

MR. BERNICK: I'm sorry. We had a motion on Solomon and Ewing. And I think that those are pretty straightforward. Solomon, we regard as -- well, we set it out in the motion. I'm not going to take and respond to this charge, it is a fallacious charge, but I'm not going to turn this into a swearing contest, an issue that's of no consequence in order to get -- to satisfy Mr. Speights' desire to have Your Honor rule on the issue. I'm just not -- I'm sorry, are you still there?

THE COURT: Yes.

MR. BERNICK: I'm not going to do that. Our position is that it's irrelevant to any issue in the case. It is a matter that should not be brought before the Court, and particular for the purpose for which it's proffered, and we'll simply rest on our brief.

THE COURT: All right. With respect to Solomon then, Mr. Speights?

MR. SPEIGHTS: Well, Your Honor, at the omnibus hearing a few days ago, Mr. Bernick said he would address that when it comes up at the confirmation hearing.

THE COURT: Actually that's my recollection, too, Mr. Speights. I did agree to put this on the agenda, because it was filed and I thought it would be better to address it now than trying to do it at the confirmation hearing, but that's my recollection, as well.

MR. BERNICK: That is correct. And I was content to do that on the theory that why make more of a big deal than what it was, except that in thinking about it, (a) it brings Mr. Solomon there, which is unnecessary in our view, and (b) it makes an even bigger issue out of this. This is just grandstanding, Your Honor, and it's improper grandstanding. And he has absolutely no answers. He has four pages reciting this long history, all of which is belied by the fact that as recently as July the 20th -- as recently as July the 20th, he was still not prepared to commit to whether he was going to call Mr. Solomon. He only committed to do that, literally, I think, two days before the end of the confirmation hearing that we just had.

So, while it's true that we could have raised it before, there was no reason for raising it before. Now, we've raised it and he has absolutely no answer to why it is that this event that he believes took place back in 2005 is germane

with respect to a different plan.

THE COURT: Okay, Mr. Bernick, you were relying on your papers, so this is Mr. Speights' turn. Mr. Speights?

MR. SPEIGHTS: Thank you, Your Honor. As I said, number one, we didn't think it's appropriate to be heard today but for the reason I said. But, in addition, Your Honor, what we have said consistently since July 20th and said in our most recent papers is, we needed to finish Mr. Shelnitz's deposition before we would make a final determination.

When we were up at the confirmation hearing and he asked can we take his deposition, we said, sure and we made him available the next day. We thought we were doing something good when we agreed to let his deposition be taken on 24 hours notice. But, we are still in the position of arguing, Your Honor, that we ought to have Mr. Shelnitz first. I asked Mr. Shelnitz -- I don't have a page by it, I could provide one -- I asked Mr. Shelnitz about Mr. Solomon. Mr. Shelnitz said he had read the affidavit, but when I tried to inquire as to whether if that occurred it would be appropriate, he was instructed not to answer. So, I do want to ask Mr. Shelnitz -- and Your Honor's going to rule, I'm not rearguing that -- I do want to ask Mr. Shelnitz about the events of 2005 when Mr. Finke identified him, at least implicitly, as the person who approved this campaign against Speights and Runyan and Anderson Memorial Hospital, and that is what Mr. Solomon was tied to. But, I

think we need to resolve the Shelnitz matter, and whether I'm going to be able to inquire in that so I can make a determination of whether I'm going to call Mr. Solomon. Everybody knows --

THE COURT: Okay, I've lost --

MR. SPEIGHTS: -- what Mr. Solomon is going to say now, because they've taken his deposition, although he might elaborate a little more because they didn't ask every question they could have asked.

THE COURT: But, I've lost how this is leading to some discrimination in the plan. If that's the argument, regardless of whether the statement took place or not, I don't know how it shows discrimination in the plan.

MR. SPEIGHTS: And I'll respond in two ways, Your Honor. First, I think when it's our time, it's not our time yet, they're still on their case --

THE COURT: Mr. Bernick, you need to put your phone on mute.

MR. BERNICK: Your Honor, I'm sorry. You know.

THE COURT: Mr. Speights, go ahead.

MR. SPEIGHTS: I do think, and I am going to address your question on the merits, Your Honor, but I do think the debtor needs to rest its case on good faith, and they haven't done so. And then we're going to turn around and Mr. Solomon will be there. We would like to call Mr. Solomon, and Your

Honor knows exactly what it is he's going to testify about, but we will have -- call him at the point in time where we present our whole case on the plan is not presented in good faith.

We think that we can show a picture that started in 2005 after they filed a proposed plan of reorganization. They filed their proposed plan. We started negotiations with Mr. Beber and Mr. Finke and all of a sudden for reasons I suspect, but need to be able to prove through Mr. Shelnitz, but for whatever reason they pulled the plug on negotiating with Anderson and Mr. Speights and decided to "smear" Mr. Speights and his PD claims in this bankruptcy. And that process continued from 2005 through at least the final blow was when they took the treatment of Anderson in the plan and changed it from what they originally provided and said, well, Anderson, you will be the only one or perhaps now if California comes back, that would go back to the bankruptcy and try a prefiled case that we said could be returned to the torts system on at least four occasions in papers presented in the early part of this case.

And Mr. Solomons' testimony is just one piece of that puzzle to show the entire picture. Again, Your Honor, we urge you to rule on that at the confirmation hearing. But, at least until after Your Honor rules on Mr. Shelnitz so we can evaluate --

THE COURT: All right, but with respect to -- I'm

sorry, just a second. With respect to Mr. Shelnitz's deposition on that point, first of all, was Mr. Shelnitz there to have participated in the discussion? Because if not, what difference does it make whether Mr. Shelnitz has an opinion that this was or wasn't an improper method of negotiating or statement to make, whatever the question is going to be?

MR. SPEIGHTS: We think the evidence will show, Your Honor, that Mr. Shelnitz instructed, made a decision to reverse the Court on negotiation that was in place with Mr. Finke and Mr. Beber. And Mr. Shelnitz instructed its counsel to go after "Speights and Runyan," and Anderson's claim, and Mr. Bernick's statement made at that meeting was in furtherance of a position that Mr. Shelnitz had taken on behalf of W.R. Grace.

Only in the alternative, if I'm mistaken, Mr. Shelnitz can disavow whatever -- such a statement if, in fact, it was made. Mr. Shelnitz can say if that statement was made, I disagree with it, and that was not the policy of W.R. Grace. I believe the circumstantial evidence and the testimony of Mr. Finke support the proposition that Mr. Shelnitz himself was the key decision maker that decided to reverse course and go after Speights and Runyan after the plan had been filed.

MR. BERNICK: Your Honor, this is Mr. Bernick. The affidavit -- to answer Your Honor's question -- from Gibbs and Solomon says that the attendees at the meeting were myself, Ms. Brody, Bob Beber, Richard Finke, Dan Speights, Alan Runyan and

himself. There was no mention in this affidavit of Mr. Shelnitz being there, because he was not, nor was there any testimony from Mr. Finke that it was Mr. Shelnitz who made the decision to reverse course and smear Anderson. This is a scurrilous matter. This is absolutely beyond the bounds. Mr. Spieghts was doing it for only one reason, which we now know, which was to obstruct this process and make a spectacle of it. This is sanctionable conduct. There should be sanctions here for pursuing it and taking up the Court's time in making these allegations. And he can't even tell Your Honor the answer to a simple question of who was there. He just got done telling Your Honor, this is now all being held hostage to his getting testimony from Mr. Shelnitz. We've seen this before.

There's no way, short of an order from Your Honor, that these issues ever get resolved with Mr. Speights. He'll continue to pursue them forever. We have got a confirmation hearing to complete. Your Honor's worked unbelievably hard, so has everybody else. It's time to end. Let Mr. Speights call the witnesses that he's permitted to call and that we end this process, because it will not end otherwise.

MR. SPEIGHTS: Your Honor, I never suggested, never have suggested that Mr. Shelnitz was at the meeting in Washington. The affidavit doesn't say that. Mr. Finke's testimony was that that decision was made in April before the June or July meeting and it was made by the general counsel of

W.R. Grace.

MR. BERNICK: There was no testimony concerning that decision --

MR. SPEIGHTS: May I finish please?

MR BERNICK: It's just a lie, Your Honor.

MR. SPEIGHTS: That is not --

THE COURT: Then give me the point in the --

MR. SPEIGHTS: -- that is highly inappropriate.

THE COURT: Just give me the point in the deposition transcript where it shows up so that I don't have to decide whether one of you is or isn't telling me the truth, please. Just give me the deposition cites.

MR. SPEIGHTS: I think you're asking for the Finke deposition cites, Your Honor.

THE COURT: Yes, sir.

MR. SPEIGHTS: May I e-mail that to --

THE COURT: Yes.

MR. SPEIGHTS: Thank you, Your Honor. I will do that in the next few minutes.

MR. BERNICK: Well, I'm not in a position to get the e-mail.

THE COURT: Ms. Baer is on the phone. Ms. Baer's on the phone, is there anyone else there who can then contact you and give it to you?

MR. BERNICK: Yes.

THE COURT: Who else? Or is Ms. Baer satisfactory?

MR. BERNICK: No, that's fine. I don't --

THE COURT: All right.

MR. BERNICK: It doesn't --

THE COURT: Ms. Baer, are you able to get in touch with Mr. Bernick?

MS. BAER: Your Honor, I am in front of my computer and can get whatever Mr. Shelnitz is e-mailing, but I believe Mr. Bernick's on his phone, so it will be a little hard to contact him.

THE COURT: Well, I understand that. But, you know, if it comes through now, then we can get it here and I can read it. If you get it, Ms. Baer, we can read it. So, okay. Let's move on to something else while I'm waiting for this.

MR. SPEIGHTS: Well, Your Honor, now I can't -- do you want me to get off the phone and find the deposition send it to you or do you want me to argue the next matter? I'll do whatever you want.

THE COURT: No, I want you to argue the next matter, Mr. Speights, and then you can submit the deposition and the transcript cite later.

MR. SPEIGHTS: It will just be shortly after the hearing.

THE COURT: I'm sorry?

MR. SPEIGHTS: It will be shortly after the hearing.

THE COURT: All right.

MR. BERNICK: Your Honor, again, this is just absolutely -- after the hearing means we can't get a -- we are days away from getting this thing done --

THE COURT: Mr. Bernick ---

MR. BERNICK: -- and we still can't get a commitment.

THE COURT: Mr. Bernick, I'm going to have to make rulings as to whether or not the deposition will or won't go forward. So, I want to see the deposition citation that indicates that Mr. Finke has somehow or other indicated that W.R. Grace, through its general counsel, is negotiating the plan that is before me in bad faith.

MR. BERNICK: But, we know that that can't be, because the plan before you didn't come into existence until years later.

THE COURT: Well, that's what I was asking earlier, Mr. Speights. I'm still not sure how this discussion shows that -- well, Mr. Speights indicated that it's a course of conduct that has continued to date.

MR. BERNICK: Right. That's what it -- right, that's what it always is when somebody wants to make out the conspiracy theory. Well, this is the course of conduct and let's link this and this and this and this and this, and he's already told you, Your Honor, that that's what he's going to continue to do. And the only way to deal with that is to deal

with the elements of the course of conduct that he alleges one by one and see if they link up. That was a meeting that took place in connection with a completely different set of discussions about a completely different plan. There's nothing to do -- there's no plan on the table called this plan that was the subject of that discussion at that meeting.

Contrary -- then he takes the other element and he says, oh, nobody talked to me about this plan. That's outright false. I sat in the Atlanta airport with Mr. Baena, Mr. Speights and a whole group of people talking about this plan and in particular the case management order, face to face. And that's why this whole thing is just not going to end until we take this from being a discussion about conducing inquiry of Mr. Shelnitz to get under his skin and to get into an issue that he knows is going to continue to generate litigation, and get back to what the case is about. The case is about this plan, not whether Mr. Speights can smear people with a broad allegation. It is outrageous, Your Honor. And this is not a question of --

THE COURT: Okay, let's move on.

MR. BERNICK: -- his supplying deposition cites, he should have supplied -- he should have done this a long time ago. He should have brought these matters up back in July, and when Your Honor said this is off limits, that's what you said in July, it's off limits.

THE COURT: Okay, let's get on to the next --

MR. SPEIGHTS: Your Honor, for the record, I have cited Mr. Finke's testimony in one or more of the briefs dealing with Mr. Shelnitz. But, I will again send you that portion of the deposition which Mr. Finke said the general counsel made the determination to terminate the negotiations with Mr. Finke and Mr. Beber and then move on to another subject.

MR. BERNICK: Oh, okay. So, that's what it is. If Mr. Finke and Mr. Beber --

MR. SPEIGHTS: That's what I had consistently said, Your Honor. I said it over and over again.

MR. BERNICK: Oh, no, no, no.

THE COURT: Gentlemen, stop.

MR. BERNICK: What Mr. Speights --

THE COURT: Gentlemen. Gentlemen, I am not going to have you shouting over each other. I will terminate this call.

MR. BERNICK: I'm sorry.

THE COURT: Mr. Speights, you were making a statement that I couldn't hear.

MR. SPEIGHTS: Your Honor, I have been consistent about this in every brief that I have filed concerning Mr. Shelnitz since their first motion for protective order which was filed in June. And that is that in February 2005 in connection with the plan that they proposed at that time, I had

settlement negotiations going forward with Mr. Finke and Mr. Beber. And then in April of 2005 they "declared war," on Speights and Runyan. So, I took Mr. Finke's deposition back in March, I think. The first deposition I took. And I asked Mr. Finke about this. Mr. Finke confirmed that we did have ongoing discussions and I asked him, in effect, to confirm that they ceased talking to me about those discussions, about those resolutions of those claims. He acknowledged that W.R. Grace did cease talking to me. I said to Mr. Finke, in effect, Mr. Finke, you and I have dealt with each other for many years, I have never known you to stop talking to me without at least picking up the phone and calling me and saying, I'm not going to talk about this anymore. And he acknowledged that was true. And I asked him why he did it in this case, and he said he was directed not to talk to me. And I asked him who directed him not to talk to me, and he said the general counsel of Grace.

Now, Mr. Finke took over as general counsel in April. So, he wasn't 100 percent sure it was Mr. Finke -- it was Mr. Shelnitz, but all indications are that it is for various other reasons, Mr. Finke himself having testified that he was in charge of claims during that period of time. That's a fact.

THE COURT: All right. I don't need the cites for that, Mr. Speights. I thought there was a different citation that you were giving me. I do not need the cites for that.

MR. SPEIGHTS: I'm giving you Mr. Finke's deposition

citation.

THE COURT: I don't need it. I have seen portions of briefs and transcripts and so forth that essentially acknowledge that the negotiations with Anderson Memorial broke off. My understanding though, and please again, correct me if my time sequence is wrong, but I thought that you and Mr. Restivo were still settling cases, not Anderson Memorial, but other cases, as recently as a couple months ago.

MR. SPEIGHTS: There is no question that after the onslaught of litigation that started on September 1, 2005 and went up to maybe in 2007, that, as Your Honor recalls, I came to Pittsburgh, and when no one else was in the courtroom but Mr. Restivo. And after, at the end of that hearing, I suggested to Your Honor that we mediate the Speights and Runyan claim. And Your Honor agreed with me, even though at some point Grace objected to a mediation process. And as a result of that, and I appreciate that, Your Honor, ordering that mediation, as a result of that we started the mediation and discussions resumed with Mr. Restivo, and Mr. Beber and Mr. Finke that resulted in a number of the non-Anderson claims being resolved.

MR. BERNICK: Your Honor, again, that is a completely misleading recitation. First of all, Mr. Finke is no longer, per Mr. Speights, acknowledging some smear campaign and saying it was due to Mr. Shelnitz or declaration of war. Yes, there

was a break off. The sequence, though, is entirely different. Mr. Beber had a long history of relations, not only with Speights and Runyan, but with many people. And he was initially enlisted by Mr. Siegel to try to bring people to the table and talk, and that didn't end up working. And one of the reasons why it didn't was that Mr. Speights was not interested in playing ball. So, effectively, that initial round of discussions that Mr. Siegel, I think who even has testified about in this case, didn't come to fruition.

We then went with the global discussions and Judge Pointer, and they didn't come to fruition. We then took them one step at a time and we did PI, and as we made progress with PI, we also recommenced PD, a mediation that he says broke the log jam, didn't break the log jam. Mr. Restivo negotiated with each and every one of the law firms to resolve each and every one of their claims, including Mr. Speights.

This whole process is totally transparent. It's been the subject of numerous reports to the Court in connection with the exclusivity hearing, and the outcome of it is, yes, discussions broke off at one point, as they did at many points, because they were not productive. But, no, they did continue and Grace was successful in resolving the overwhelming bulk of claims and this plan now reflects that resolution --

THE COURT: All right. Gentlemen --

MR. BERNICK: -- and Mr. Speights was involved every

step of the way.

THE COURT: All right. It seems to me that the essential facts are not in dispute. What is disputed by you is the spin that should be put on those facts. No one seems to dispute the fact that the negotiations broke off, that they resumed at a later time. That what wasn't settled was Anderson Memorial, that Anderson Memorial is in a class in the plan that's going to require litigation before the Bankruptcy Court whereas futures are not. That other property damage claims that are current would also be in the class with Anderson Memorial.

Those seem to me to be the essential facts. I don't see at this point where discovery is going to elucidate any additional facts. I think you can make arguments, as you're already making, as to what the outcome of those facts should be, but I'm not seeing where discovery is going to generate additional facts.

MR. SPEIGHTS: Your Honor, I respectfully disagree with Mr. Bernick's statement of facts, and I agree that it's not the appropriate time to argue that. I think the confirmation hearing is a more appropriate time. And I do believe, first of all, that Mr. Solomon -- we've had full discovery on that, he will or will not testify, depending on Your Honor's ruling either today or at the confirmation hearing. And with respect to Mr. Shelnitz, we want to get

behind the decision to treat Anderson in a disparate way and I understand Your Honor's concern and I'm not going to repeat all the arguments I made, but I do think that I need to make clear that I disagree with many of the factual assertions that Mr. Bernick has made, as he disagrees with many of my factual assertions.

THE COURT: All right. Well, to the extent that there is a suggestion on the record, I haven't seen any evidence of this anywhere. There is the fact that negotiations broke off. I have not seen evidence that I think you're trying to elicit, Mr. Speights, that indicates that Anderson was somehow or other singled out for this process.

MR. SPEIGHTS: And that's what I want to get through Mr. Shelnitz.

MR. BERNICK: No, no, no. Your Honor, it broke off in connection -- in 2005 in connection with all of Mr. Beber's efforts. Not only with Mr. Speights, but I think also with respect to others. But, even if was just Mr. Speights, which I don't think it was, it wasn't focused just on Anderson Memorial. It wasn't working. We had thousands of unauthorized claims. So, the idea that somehow 2005 links up with what subsequently happened with respect to Anderson Memorial, which was the only one of Mr. Speights' cases that was either not dismissed or settled, there's no basis for that fact, it's just an assertion of a conspiracy connection that comes out of

Mr. Speights. There was no break off of discussion. No break off of discussion such that Anderson Memorial was singled out for any kind of special treatment.

There was an effort to settle Anderson Memorial, along with all of Mr. Speights' other claims. It so happens that Anderson was not settled, we think in part because Mr. Speights wants to keep his class issue alive. But, whatever it was, it's not the appropriate subject of inquiry --

THE COURT: Hello. Court Call operator, do we still have everyone?

OPERATOR: It looks like I do.

THE COURT: Okay, thank you. Go ahead, Mr. Bernick.

MR. BERNICK: That's why, again, each one of these things he wants to weave together. But, just like we saw about 2005 and the somehow, you know, the war, the smear campaign is all Mr. Shelnitz, now it turns out to be Mr. Siegel, and yes, they broke off discussions, but they broke of discussions with respect to all of the Anderson claims, and Anderson was -- not the Anderson claims -- all of the Speights' claims, and the plan that was on the table then is not the plan now. You go to what happened with Anderson in settlement years later, it's a completely different story. The whole deal of how things are being handled is different. It's claim by claim. We're dealing separately with the PI people. And again, all of this, every single scrap of the process was open book. In fact, it

was discussed again before the Court, when Judge Sanders was on the stand.

So, Mr. Speights is not satisfied with the treatment that Anderson Memorial got, and he thinks this case has got more value than we did, and he wants to make objections, fine. But, the idea that this serves as a springboard for pursuing some kind of conspiracy theory, I just think it's abusive. And there's no record for it. We've now exposed that the Finke deposition did nothing to indicate or endorse the idea that there was some campaign to target Anderson Memorial or even Mr. Speights, and he testified about this. He wasn't prevented from testifying about it.

THE COURT: I'm losing the relevance, and I think that's the problem. But, the difficulty is, it's a relevance issue that I'm hung up on. It seems to me, Mr. Speights, if you want to call Mr. Solomon at trial, I'll deal with whether or not he is an appropriate witness in the context of your case, because I think at this point what you're attempting to allege, through Mr. Solomon, is not going to be relevant. But, I'm hesitant to say that until I hear that in the context of the case. Because if it turns out to be relevant, I don't want to preclude you from calling a witness in that regard.

So, I am going to deny the motion in limine, but I am going to reserve any rulings with respect to Mr. Solomons' testimony until -- unless and until he is called at trial.

With respect to the fact that you need to conclude the Shelnitz deposition before you make that determination, I can't give you that ruling until later when I go back through. So, as soon as you determine whether you're going to call Mr. Solomon, you are to let counsel know, and definitely before your case in chief starts, at least a day before your case in chief starts, so that they can prepare. But, I will not grant the motion in limine, because it seems to me that this is going to come down to a relevance issue.

Okay, next. Ms. Baer, if you could, when you have an opportunity, submit an order that will deny the motion in limine without prejudice to raising any issues if and when Mr. Solomon is called at trial, I will take that order.

MS. BAER: Thank you, Your Honor. I will.

THE COURT: Okay. Obviously, show it to Mr. Speights.

MS. BAER: Yes.

THE COURT: Okay. Next, Mr. Bernick?

MR. BERNICK: I'm sorry?

THE COURT: I think you wanted to argue the William Ewing motion in limine.

MR. BERNICK: Well, Mr. Speights has told me he can't tell whether he's going to call Ewing until he finds out about the Shelnitz depositions. I had a call with him where he confirmed that. So, I guess we have to go forward on that one,

too. Mr. Ewing has no expert report. So, he shouldn't testify as an expert.

MR. SPEIGHTS: Your Honor, I believe that Mr. Bernick misunderstood what I said to him earlier today, and I will repeat what I said to him earlier today. If the plan proponents are not putting into evidence or relying on some evidence that is already there that I'm not aware of or any other piece of evidence, that they are not putting in any evidence or relying on any evidence of the value of the traditional PD claims, present and future, then I have no intention of offering Mr. Ewing as a witness in the case. I have said for some period of time that Mr. Ewing is a feasibility expert on the value of traditional PD claims. But, as I understand, I may be mistaken, I'll let Mr. Bernick speak for the debtors, and they're not offering any evidence, they're not relying on any evidence as to the value of the traditional PD claim.

MR. BERNICK: Your Honor, that again is a misrepresentation of what we've discussed, and I should have known better than to try to recite it or count on it. What was actually discussed was whether the debtor is going to put in an estimate of the liability that may be associated with future traditional PD demand. It wasn't whether there's going to be any evidence in the record about this, or that or the other. It was whether we're going to proffer expert testimony to

provide an estimate -- whether we would proffer expert testimony to provide such an estimate. I said we would not and I thought that that was the end of it. But, now apparently the language is different. I can't stay on the call. I'm sorry, Your Honor. I've got to get on an airplane or I'll miss a Ninth Circuit argument 8:30 tomorrow morning. I think the only issue now that remains is not an -- an issue of relevance, too, it is whether an individual who put no expert report in can now testify as an expert witness. I can't negotiate over the phone with Mr. Speights on what the scope of his deal is that he intends or believes that he offered us, because that will just go down the same rabbit hole that we've been just now.

THE COURT: Well, all right. On the issue of not having an expert report, I think the case management order is pretty clear, that a witness is not going to testify if there's no expert report. So, on that score, I would not be hearing from an expert as an expert if no expert report has been provided, and I guess maybe that will end that matter.

With respect to what the debtor's going to rely on for its estimates for feasibility, that's going to be up to the debtors' burden of proof. Mr. Speights, I'll hear from you at the close of the debtors' evidence as to why it is that you may need either to produce Mr. Ewing or whatever it is you may choose to do at the end of that case, because I don't know what the debtor is going to produce either.

MR. SPEIGHTS: I understand that, Your Honor. And again, I said this earlier, but I know this has been a lengthy hearing, that we did inquire of Mr. Shelnitz and they refused to allow Mr. Shelnitz to testify as to whether the debtors have made an estimate about PD liability --

THE COURT: Well, I think Mr. Shelnitz --

MR. SPEIGHTS: -- and that was one of the areas we wanted to inquire about.

THE COURT: Well, Mr. Shelnitz would not be the appropriate witness, because he is counsel. I mean, there must be other witnesses who could identify that area. And it would be very difficult to substantiate that he's the only person within Grace who knows whether an estimate has been made. So, to that --

MR. SPEIGHTS: We also asked Ms. Zilly and Mr. La Force, but we have not been able to discover any estimate of PD liability, I'm trying to do so in good faith.

MR. BERNICK: I'm sorry, Your Honor. That is again false. Look at .5 on our chart. It says, has Grace made an estimate for future traditional PD demands? We did instruct Mr. Shelnitz and Ms. Zilly not to answer it because it related to matters that might potentially be privileged. But, we then said, we can provide the answer and will do so by way of interrogatories. The answer says, no. No such estimate has been prepared since 1995 when an estimate was done in

connection with the Sealed Air transaction or the Fresenius transaction. So, the answer is out there in black and white and I've told Mr. Speights this over the telephone, there's no reason on God's earth to conduct inquiry of Mr. Shelnitz with respect to something that does not exist.

THE COURT: All right, well --

MR. SPEIGHTS: And I would ask you to read Number 6, right under that, Your Honor, but --

MR. BERNICK: That's a different question. Had Grace made an estimate for its unresolved traditional PD claims. If there's any such estimate, it's privileged, and that gets back to the reserve. They're totally consistent.

THE COURT: Okay, gentlemen, I will give you rulings.

I am not going to grant the motion in limine with respect to Mr. Shelnitz. I am going to grant it, without prejudice, with respect to Mr. Ewing for the reasons that I have just expressed, which are that it appears that Mr. Ewing has not provided an expert report. Mr. Shelnitz does not appear to be the only person within Grace who would have the knowledge as to whether an estimate has been prepared or not. A finance witness or someone -- Ms. Zilly, perhaps -- could certainly answer the questions as to whether they have or have not prepared that estimate. I've already made rulings with respect to the attorney/client privilege and work product and Rule 408 issues concerning a reserve, but the question as to

what 37 million is, i.e. is it a reserve, can be answered. If it can be done by interrogatory, that's fine. I will go through these questions and the debtors' responses and give you an order, hopefully tomorrow.

MR. SPEIGHTS: Thank you, Your Honor.

THE COURT: We're adjourned. Oh, Ms. Baer -- we're not adjourned.

MS. BAER: Yes, Your Honor, I'm on.

THE COURT: I'd just like an order from you with respect to Mr. Ewing.

MS. BAER: I will do so, Your Honor.

THE COURT: All right. Thank you. Now, we're adjourned.

MS. BAER: Thank you.

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C E R T I F I C A T I O N

I, RITA BERGEN, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Rita Bergen DATE: October 14, 2009

RITA BERGEN

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